

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOURDES SANCHEZ,

Plaintiff,

vs.

GREENPOINT MORTGAGE
FUNDING, INC., BANK OF AMERICA
HOME LOANS, ASTEC
FORECLOSURE CORPORATION,
OCWEN LOAN SERVICING, LLC,
COASTAL EMPIRE MORTGAGE,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as
nominee for RWPO III, LLC as
beneficiary and DOES 1-20, inclusive,

Defendants.

CASE NO. 09 CV 2005 JM (WMC)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS OCWEN LOAN
SERVICING, LLC AND RWPO
III, LLC'S MOTION TO
DISMISS; and GRANTING
DEFENDANT GREENPOINT
MORTGAGE FUNDING INC.'S
MOTION TO DISMISS**

Doc. Nos. 35, 36

Plaintiff Lourdes Sanchez (“Plaintiff”) filed this action raising claims related to a residential mortgage transaction. (Doc. No. 1). After Defendants Ocwen Loan Servicing, LLP (“Ocwen”) and RWPO III, LLC (“RWPO”) filed a motion to dismiss the complaint, Plaintiff filed a first amended complaint (“FAC”) as a matter of course. (Doc. Nos. 5, 14). Ocwen and RWPO then filed a motion to dismiss the FAC. (Doc. No. 19). In addition, Defendant GreenPoint Mortgage Funding, Inc. (“GreenPoint”) filed a separate motion to dismiss. (Doc.

1 No. 20). The court granted in part and denied in part Ocwen and RWPO's motion to dismiss,
 2 and granted Greenpoint's motion to dismiss. (Doc. No. 33). With leave of court, Plaintiff filed
 3 a second amended complaint ("SAC"). (Doc. No. 34). All three parties have now filed
 4 motions to dismiss Plaintiff's second amended complaint. (Doc. Nos. 35, 36).

5 The court finds this matter appropriate for determination without oral argument. *See*
 6 CivLR 7.1(d)(1). For the following reasons, the court hereby GRANTS IN PART and
 7 DENIES IN PART Ocwen and RWPO's motion to dismiss without leave to amend. The court
 8 GRANTS GreenPoint's motion to dismiss without leave to amend.

9 **I. BACKGROUND**

10 In July 2007, Plaintiff purchased a home with financing borrowed from GreenPoint.
 11 (SAC ¶ 6). Plaintiff used Defendant Coastal Empire Mortgage as her broker. (SAC ¶ 8).
 12 Ocwen was Plaintiff's loan servicer. (SAC ¶ 7). At some point, "Plaintiff began having
 13 difficulty paying her mortgage." (SAC ¶ 20). As a result, Plaintiff received notice of a
 14 trustee's sale indicating that Plaintiff's home would be sold at a foreclosure sale in September
 15 2009. (SAC ¶¶ 20, 23). Sometime in the last year, Plaintiff conducted a "forensic audit"
 16 which allegedly revealed various irregularities and legal violations related to Plaintiff's loan.
 17 (SAC ¶ 81).

18 **II. LEGAL STANDARD**

19 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the
 20 pleadings. *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). In evaluating the motion,
 21 the court must construe the pleadings in the light most favorable to the plaintiff, accepting as
 22 true all material allegations in the complaint and any reasonable inferences drawn therefrom.
 23 See, e.g., *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003). While Rule 12(b)(6)
 24 dismissal is proper only in "extraordinary" cases, the complaint's "factual allegations must be
 25 enough to raise a right to relief above the speculative level." *United States v. Redwood City*,
 26 640 F.2d 963, 966 (9th Cir. 1981); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 27 The court should grant 12(b)(6) relief only if the complaint lacks either a "cognizable legal
 28 theory" or facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police*

1 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

2 **III. DISCUSSION**

3 **A. Ocwen and RWPO's Motion to Dismiss**

4 Plaintiff asserts just two claims against Ocwen and RWPO in her second amended
 5 complaint: (1) violation of RESPA section 2605; and (2) quiet title.

6 **1. RESPA, 12 U.S.C. § 2605**

7 The court has already found that Plaintiff stated a claim for relief under RESPA section
 8 2605 in her first amended complaint. (*See* Doc. No. 33). Accordingly, Ocwen and RWPO's
 9 motion to dismiss the claim is denied.

10 **2. Quiet Title**

11 Plaintiff has not repaired the deficiencies of her first amended complaint with her
 12 second amended complaint. Indeed, it appears that Plaintiff has failed to amend her quiet title
 13 claim in any fashion.

14 To state a claim to quiet title, a complaint must be verified and include (1) a legal
 15 description of the property and its street address or common designation, (2) the title of the
 16 plaintiff and the basis of the title, (3) the adverse claims to the title of the plaintiff, (4) the date
 17 as of which the determination is sought, and (5) a prayer for the determination of the title of
 18 the plaintiff against the adverse claims. Cal. Civ. Proc. Code § 761.020. The court concludes
 19 once again that Plaintiff fails to sufficiently allege a cause of action for quiet title against
 20 Ocwen and RWPO. Plaintiff fails to allege the "specific adverse claims" that form the basis
 21 of her cause of action. *See id.* cmt. at ¶ 3. Instead, Plaintiff brings this claim "against all
 22 Defendants claiming a right or interest," but then fails to make specific, factual allegations
 23 against either Ocwen or RWPO. (FAC ¶ 41-44). This is insufficient to provide Ocwen and
 24 RWPO with notice of the grounds upon which Plaintiff bases her cause of action.
 25 Accordingly, the Court grants Ocwen and RWPO's motion to dismiss Plaintiff's claim for
 26 quiet title without leave to amend.

27 **B. GreenPoint's Motion to Dismiss**

28 In her second amended complaint, Plaintiff asserts four claims against Greenpoint: (1)

1 intentional misrepresentation; (2) fraudulent concealment; (3) violation of TILA; and (4)
 2 violation of RESPA.

3 **1. Intentional Misrepresentation / Fraudulent Concealment**

4 Under California law, the elements of fraud are false representation, knowledge of its
 5 falsity, intent to defraud, justifiable reliance, and damages. *See Bank of the West v. Valley*
6 Nat'l Bank of Ariz., 41 F.3d 471, 477 (9th Cir. 1994) (citation and quotation marks omitted).
 7 Under Federal Rule of Civil Procedure 9, a Plaintiff must plead fraud with particularity. “Rule
 8 9(b)’s particularity requirement applies to state-law causes of action.” *Vess v. Ciba-Geigy*
9 Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). “Averments of fraud must be accompanied
 10 by ‘the who, what, when, where, and how’ of the misconduct charged.” *Id.* at 1106 (quoting
 11 *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “[A] plaintiff must set forth more than
 12 the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false
 13 or misleading about a statement, and why it is false.”” *Id.* (quoting *Decker v. GlenFed, Inc.*
 14 (*In re GlenFed, Inc. Sec. Litig.*), 42 F.3d 1541, 1548 (9th Cir. 1994)). On a claim for fraud,
 15 then, a “pleading is sufficient under rule 9(b) if it identifies the circumstances constituting
 16 fraud so that a defendant can prepare an adequate answer from the allegations.” *Moore v.*
17 Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989) (citation omitted). “While
 18 statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere
 19 conclusory allegations of fraud” are not. *Id.* Further, Rule 9(b) requires a plaintiff to attribute
 20 particular fraudulent statements or acts to individual defendants. *Id.*

21 Plaintiff’s SAC, like her FAC, falls short of the specificity required by Rule 9(b).
 22 Plaintiff still lacks adequate factual allegations about specifically who made the false
 23 representations, when they were made, or how they were false. Insofar as Plaintiff provides
 24 any specificity, she does not identify specific fraudulent conduct by Greenpoint. Therefore,
 25 the court grants GreenPoint’s motion to dismiss Plaintiff’s intentional misrepresentation claim.
 26 Furthermore, Plaintiff has failed to fix the pleading deficiencies in two amended complaints.
 27 Accordingly, the motion to dismiss is granted without leave to amend.

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2. TILA

A request for any damages under TILA is subject to a one-year statute of limitations, typically running from the date of the loan execution. 15 U.S.C. §1640(e). The Ninth Circuit has held equitable tolling of civil damages claims brought under TILA may be appropriate “in certain circumstances,” such as when a borrower might not have had a reasonable opportunity to discover the nondisclosures at the time of loan consummation. *King v. State of California*, 784 F.2d 910, 914-15 (9th Cir. 1986).

8 Although Plaintiff claims that facts to support her TILA claim were discovered during
9 a “forensic audit” conducted in the past year, this allegation is insufficient to toll the statute of
10 limitations. The information showing any irregularities in the loan would have been contained
11 in the documents she received at closing. Plaintiff argues that she would “need the assistance
12 of a mortgage professional in order to determine the true cost of the loan,” and therefore
13 equitable tolling is appropriate. But Plaintiff still fails to explain why she was unable to obtain
14 the assistance of a “mortgage professional” prior to the running of the statute of limitations.
15 Therefore, the court grants GreenPoint’s motion to dismiss Plaintiff’s TILA claim without
16 leave to amend.

3. RESPA (§§ 2607, 2608)

18 The statute of limitations applicable to RESPA claims—other than those pursuant to
19 section 2605—is one year. *See* 12 U.S.C. § 2614. As already discussed, Plaintiff fails to
20 allege sufficient facts to toll the statute of limitations. Therefore, the court grants GreenPoint’s
21 motion to dismiss Plaintiff’s RESPA claim.

C. Ocwen and RWPO's Motion to Expunge Lis Pendens

23 To maintain her lis pendens, Plaintiff must show the existence of a real property claim,
24 that is, a claim “that affects title or possession of the subject property.” *Urez Corp. v. Superior*
25 *Court*, 190 Cal. App. 3d 1141, 1149 (1987). Plaintiff’s RESPA claim will not affect title or
26 possession of the subject property. As all other claims are dismissed, Plaintiff can have no
27 basis for maintaining the lis pendens. Accordingly, the court grants Defendants’ motion to
28 expunge the lis pendens.

IV. CONCLUSION

2 For the foregoing reasons, the court hereby GRANTS IN PART and DENIES IN PART
3 Ocwen and RWPO's motion to dismiss without leave to amend. The court GRANTS
4 GreenPoint's motion to dismiss without leave to amend. The court GRANTS Ocwen and
5 RWPO's motion to expunge the lis pendens. Ocwen shall file an answer to Plaintiff's
6 complaint no later than June 4, 2010.

IT IS SO ORDERED.

8 | DATED: May 10, 2010

Hon. Jeffrey T. Miller
United States District Judge